Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-1270

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

THE COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

George R. Johnson
Ralph W. Peterson
JOHNSON & EASTLUND
1702 Midwest Plaza Building
Minneapolis, Minnesota 55402
Attorneys for Petitioner

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vs.

THE COMMISSIONER OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Petitioner, Associated Dry Goods Corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota, entered on December 18, 1975, in the above entitled proceedings.

OPINIONS BELOW

The decision of the Supreme Court of Minnesota is reported in 235 N.W. 2d 281 (no citation to Minnesota Reports is available). The decision is reproduced in Appendix A, *infra.* The Minnesota Supreme Court was evenly divided on the issues, one Justice taking no part, and accordingly the decision of the Minnesota Tax Court was affirmed *per curiam,* without opinion. The decision of the Minnesota Tax Court is not officially reported; it is unofficially reported in 2 CCH, Minn. Tax Rep., ¶200-675.

The tax court decision and accompanying required Memorandum is attached hereto as Appendix B, *infra.*

JURISDICTION

On June 16, 1970, pursuant to Minn. St. §271.06, Petitioner timely filed a Notice of Appeal to the Minnesota Tax Court (A-5)[1] from an Order of the Commissioner of Taxation (now Commissioner of Revenue) of the State of Minnesota assessing additional corporate franchise (income) taxes against Petitioner for the years 1955-1967 (A-1, A-2). The matter came on for trial before the Minnesota Tax Court on April 26, 1971 and on May 17, 1974 the Tax Court entered its decision affirming the Order of the Commissioner of Revenue (Appendix B, *infra).* At the request of the Petitioner, a writ of certiorari to review the Tax Court's decision was issued by the Minnesota Supreme Court on July 2, 1974 (A-64). The decision of the Minnesota Supreme Court was filed on October 31, 1975. Appendix A, *infra.* A petition for rehearing was timely filed by Petitioner on November 7, 1975 and the Minnesota Supreme Court's Order denying this petition was entered on December 18, 1975 as was also the Judgment of that Court affirming the Order of the Minnesota Tax Court. Jurisdiction is conferred on this Court by Title 28, United States Code, c. 81, §1257(3).

[1]A separate 64-page printed record, denominated "Appendix", was filed with Petitioner's main brief in the Minnesota Supreme Court and is herein cited as indicated. Neither this Appendix nor the transcript of testimony before the Minnesota Tax Court has been filed as part of the within petition.

QUESTIONS PRESENTED

Is ownership by a single corporate entity of several similar but separately identified and operated businesses, each located in a different state, a sufficient basis for Minnesota, the location of one business, to tax on a formulary method, the aggregate income from all of such businesses?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment XIV, §1, Appendix C, *infra.*

2. Minn. St. §§290.02, 290.17, 290.18, 290.19, 290.20, Appendix C, *infra.*

STATEMENT OF THE CASE

Petitioner, Associated Dry Goods Corporation, is a Virginia corporation with its principal offices in New York City. Petitioner was organized in 1916 for the purpose of acquiring eight then established and operating department store businesses, each of which was, at the time, a separate corporation. Each became a wholly owned subsidiary of Petitioner. In 1951 the eight corporate subsidiaries were merged into a single corporation, Petitioner, and thus became operating divisions of Petitioner. During the period 1955 through 1967 Petitioner acquired nine additional department store operations. As in the case of the original eight, each of the nine new acquisitions was a long established, locally operating, incorporated department store business with long standing reputation in its particular community. Each was merged with petitioner and became an operating division. During the period in question, two of the original eight were closed.

Powers Dry Goods Company in Minneapolis, Minnesota, was one of the original eight stores and has been a part of Petitioner's enterprise since Petitioner was incorporated in 1916. Powers had commenced its operations in 1881. Powers has always had its own President and Treasurer and has never carried any other name than the original Powers name.

Powers Dry Goods store operates as a separate operation from all of the other stores owned by Petitioner and all day-to-day decisions are made in the Minneapolis office. Powers makes its own decisions with respect to operating departments, lines of merchandise, purchasing of merchandise, pricing, billing, colors, personnel, wages, salaries, redecorating, department layout, owned departments and leased departments, sales, advertising and promotion. In addition, Powers makes its own decisions with respect to property maintenance, legislation, local property taxes, local sales and use taxes and local community causes. Powers maintains locally its own accounting system, its own ledgers, journals, personnel files and all records pertaining to its operation .

Petitioner's New York office does not maintain personnel files, credit files, accounting records nor central computing service. It does not handle receivables. Petitioner's New York office is not involved in Powers' advertising, promotions, sales, purchasing, merchandising, departmental configuration, or any of the day-to-day operating considerations. Similarly, Petitioner does no advertising, promotion, selling, purchasing or merchandising. Petitioner does not have in New York a vice president for personnel nor for credit. It has no vice president in charge of day-to-day accounting and has no tax manager responsible for state

and local real property, personal property, sales and use taxes. The New York office does handle Petitioner's state and federal income tax returns.

Petitioner has no central nor regional warehousing; it has no central nor regional buying; and it has no delivery service common to all of the stores. Each of the foregoing activities is provided by each operating division according to its own needs.

There is no day-to-day management communication between Petitioner's New York office and Powers Dry Goods Company and there is no such day-to-day communication among the several stores owned by Petitioner. The stores do not contribute in any way to one another in their day-to-day operations nor are any of the stores dependent upon any of the other stores insofar as their normal daily operations are concerned.

There are no common denominators among the several stores such as name, warehousing, buying, merchandise lines, merchandising, colors, advertising, promotion, personnel, credit, pricing or departmental setups.

Petitioner does provide general supervision over each of the several store presidents; it does provide capital; there is regular reporting to Petitioner's New York office by the several stores, including Powers Dry Goods Company, in that each store reports daily sales and monthly operating statements. Petitioner accumulates statistics on these sales reports and they are disseminated on a weekly basis to each of the operating divisions. Similarly the monthly operating statements are transposed into comparative reports and distributed among the various operating divisions.

Petitioner maintains a market research service in its New York office which is available for the use of any of the

operating divisions on a discretionary basis. Petitioner reserves the right to approve or disapprove property acquisitions and expansion plans for any of the operating divisions but the decision to expand or acquire additional properties originates as a local activity on the part of local management of each store.

Petitioner does not maintain a staff of buyers for the several stores and each individual store group, including Powers Dry Goods Company, has a complete staff of buyers and merchandise managers who purchase the merchandise which is sold.

MANNER OF RAISING FEDERAL QUESTION AND TREATMENT IN MINNESOTA COURTS

In its Notice of Appeal to the Minnesota Tax Court, Petitioner alleged: "That the methods of allocation used by the Commissioner result in taxation by the State of Minnesota of income wholly earned beyond the taxing limits of the state and distorts income assignable to Minnesota. Such distortion and taxation is contrary to the requirements of . . . the 14th Amendment to the Constitution of the United States . . .". (A-7) Petitioner also alleged: "The methods of allocation prescribed by Minn. St. §290.19, other than the separate accounting method, and particularly as applied by the Commissioner of Taxation, do not properly, fairly and correctly reflect and determine the taxable net income of [Petitioner] allocable to the State of Minnesota . . . that such . . . income is not attributable nor in any way connected with activities of [Petitioner] within the State of Minnesota or to any business carried on within and without the State of Minnesota; such methods are, therefore, in violation of the 14th Amendment to the

United States Constitution, namely, the Due Process and Equal Protection Clauses.". (A-10) The Minnesota Tax Court did not specifically discuss the constitutional question but, concluding that Petitioner ". . . was carrying on a unitary business within and without the State of Minnesota", presumably saw nothing unconstitutional in the Commissioner's methods of allocation (formulary apportionment) and hence affirmed his order. In its brief in the Minnesota Supreme Court, Petitioner took issue with the Tax Court's conclusion that Petitioner's income producing activities in Minnesota were part of a "unitary business" and raised the additional issue that even if it be assumed that Petitioner's several department stores constitute a unitary enterprise, the Commissioner's application of formulary apportionment to Petitioner's aggregate income nevertheless "improperly and unfairly allocates to Minnesota income which has been wholly earned elsewhere so as to offend the due process and equal protection of law requirements of the . . . federal constitution . . .". The Minnesota Supreme Court discussed neither issue but, being evenly divided (one Justice taking no part), simply affirmed the Minnesota Tax Court decision *per curiam*, without any opinion that set forth its view of these issues. (Appendix A, *infra.)*

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Minnesota Tax Court concluded that the Petitioner's several department store businesses, "divisions" as the Tax Court called them, "operate separately and apart from one another"; are "run autonomously [in their] day-to-day operations"; are "separate or non-unitary in that each division operates as though it were a separate company"; and are "self-sufficient". Despite these conclusions, some of

which are contained in its Findings of Fact and others in its Memorandum[2] (Appendix B, *infra.)*, the Tax Court nevertheless upheld the Minnesota Commissioner of Taxation's Order which had claimed for Minnesota, under formulary apportionment, a share of the aggregate income of all of Petitioner's stores. Clearly the result is extraterritorial taxation, contrary to the decided cases of this Court and the 14th Amendment to the Federal Constitution.

The uniform holding of this Court has always been to the effect that state taxes can constitutionally be levied only on "that portion of the taxpayer's net income which arises from activities within the taxing state." See, e.g., *Northwestern States Portland Cement Co. v. State of Minnesota,* 79 S.Ct. 357, 365, 358 U.S. 450, 464. Justification for a state's use of formulary apportionment to reach a portion of the entire income of a multi-state enterprise cannot be found, regardless of the formula employed, unless the business is a "unitary business".[3]

In each of the leading cases decided by this Court, the multi-state business in question was either concededly unitary or was found to be such by the trial court. For the

[2]Minn. St. §271.08 expressly requires that a Memorandum of the grounds of the Tax Court's decision shall be appended to its official written Order containing the Findings of Fact and decision of the Court. The contents of the Memorandum may, therefore, be considered a part of the official decision of the Court. In such case, specific statements of fact found therein "become a part of the findings". *Thomas Peebles and Company v. Sherman,* 148 Minn. 282, 181 N.W. 715, 716.

[3]For a thorough historical discussion see Rudolph, "State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups", 25 *Tax Law Review* 171, 180. Prof. Rudolph states, *id.* at 183: "The conclusions to be drawn from this small group of cases may be simply stated. Formulary apportionment, which takes into account the entire business income of a multi-state business in determining the income taxable by a particular state, is constitutionally permissible only in the case of a unitary business."

most part, therefore, the cases reflect the Court's concern with the "fairness" and "reasonableness" of the various formulae employed rather than the basic question of whether the business in question is indeed unitary, or, on the other hand, dual or multi-form.[4] *In no case has the Court ever permitted formulary apportionment of the aggregate income of a multi-state, non-unitary business enterprise.* The decision of the Minnesota Supreme Court, however, does exactly that.

Petitioner is not asking this Court to review the evidence before the Minnesota Tax Court to determine whether or not Petitioner's enterprise is unitary or non-unitary. The Tax Court has already determined, either in its Findings or in its Memorandum, that in point of fact the Petitioner's several department stores are run "autonomously" in their day-to-day operations, are "separate", "non-unitary" and "self-sufficient". Unaccountably, however, in its Conclusion of Law the Tax Court held that Petitioner "was carrying on a unitary business within and without the State of Minnesota" and affirmed the Commissioner's use of formulary apportionment.

It would appear that the Minnesota Tax Court was confused as to whether, in deciding if Petitioner's business was a "unitary business", it should consider as controlling the operating activities of the several stores or the fact that Petitioner alone owns these stores. In its Finding #8, for

[4]See, e.g., *United States Glue Co. v. Town of Oak Creek,* 247 U.S. 321, 38 S.Ct. 499; *Hans Rees' Sons v. North Carolina,* 283 U.S. 123, 51 S.Ct. 385; *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113, 41 S.Ct. 45; *Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission,* 266 U.S. 271, 45 S.Ct. 82; *Ford Motor Co. v. Beauchamp,* 308 U.S. 331, 60 S.Ct. 273; *Butler Brothers v. McColgan,* 315 U.S. 501, 62 S.Ct. 701; *General Motors Corp. v. District of Columbia,* 380 U.S. 553, 85 S.Ct. 1156; *Northwestern States Portland Cement Co. v. State of Minnesota, supra.*

example, the Minnesota Tax Court comments that "corporate borrowings are based upon the combined assets and financial strength of all the divisions" and that "capital for the acquisition of new divisions or for the expansion of existing divisions comes from the common corporate financial resources". Findings # 8, 9, 10 and 11 also are principally concerned with utilization of capital for acquisitions, expansions, remodelings and also with corporate borrowing practices. Findings #4, 5, 6, 7, 17, 18 and part of 10 all relate to such matters as reporting, business forecasting, exchange of ideas and approval of expenditures for charitable contributions. All of these are *ownership-related* activities, or requirements, not operational activities which daily produce the income sought to be taxed by the State of of Minnesota.[5]

The investment and borrowing of capital funds, for ex-

[5]The Tax Court also apparently gave some weight to other ownership-related factors: "None of the divisions has been organized as separate corporations or separate taxpayers"; "They are not treated as subsidiaries in [Petitioner's] annual reports"; ". . . [T]he corporate executives maintain close contact with the management of each store"; and to the following matters, which are neither ownership-related nor operating activities: "[Petitioner] has a common pension plan for all of its employees . . ."; ". . . [I]ts insurance is generally carried by Liberty Mutual Insurance Company"; "The divisions are similar in that they all cater to the same type of customer"; "All of [Petitioner's] divisions use the same accounting system." The latter finding is based on evidence that Petitioner's various stores use a chart of accounts which is standard in the retail industry in this country. There is no evidence, however, of a centralized accounting service, *per se*.

The Tax Court also concluded that "[T]he business of [Petitioner] is to operate several divisions of one kind of retail department store business." The evidence is clear however that the stores are distinctive in ther individuality and in no sense can it be claimed that Petitioner operates a chain of "one kind of retail department store". In 1955 Petitioner owned eight operating units and between 1955 and 1967 closed two of these and acquired nine others. Each of the fifteen operating divisions were long established, locally operating businesses when acquired by Petitioner and each retained its established individual identity in the community after acquisiton. A list of the fifteen operating divisions is contained in Appendix D, *infra*.

ample, are perhaps the two most basic activities of any owner of a business enterprise. They are entrepreneurial activities, not operational activities. Also where one person, whether corporate or individual, owns several enterprises it is common that regular reports will be expected from those who manage each such enterprise, such as reporting progress of operations and predictions for future success. The owner is naturally concerned also with such matters as capital investment for expansion or remodeling of existing facilities as well as acquisitions of new. Certainly the owner is to be consulted in respect to gratuitous dispositions of his property such as charitable contributions.

In the early case of *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 17 S.Ct. 305, this Court, in considering the taxability of the property of a multi-state express company addressed itself to considerations of the value of the property "as a unit" stating:

> "We repeat that, while the unity which exists may not be a physical unity, *it is something more than a mere unity of ownership*. It is unity of use . . .". (emphasis added)

The *Adams* case, which was cited in *Butler Brothers v. McColgan, supra,* is perhaps the earliest expression by this Court of the present day concept of the "unitary business". Clearly the origins of the concept do not lie in considerations of unity of ownership.

This Court has in at least one instance reaffirmed the concept that unity of use or interdependence of *operating* activities, not unity of ownership, is the test of a unitary business. In *Kent Coffee Manufacturing Company v. Maxwell,* 54 S.Ct. 437, 291 U.S. 642 this Court affirmed *per*

curiam the North Carolina Supreme Court in a decision in which, among other things, the North Carolina Court undertook to define the term "unitary business":

> "That term is simply descriptive, and primarily means that the concern to which it is applied is carrying on one kind of business—a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration as independent units. By contrast, a dual or multiform business must show units of a substantial separateness and completeness, such as might be maintained as an independent business . . . and capable of producing a profit in and of themselves."

The significance of interdependent operating activities, as contrasted with non-operating activities or ownership related factors, is discussed by Jerome R. Hellerstein, "Recent Development in State Tax Apportionment and the Circumscription of Unitary Business", 21 *National Tax Journal*, 487:

> "The underlying reason for the development of formulary apportionment is that there is no viable way of separately accounting for the profits of a business where interdependent *operating functions* that produce the profits of the enterprise are carried on in more than one state." (emphasis added)[6]

As to non-operating activties, Hellerstein states that, even if centralized, they ought not introduce a necessity for the use of formulary apportionment:

[6]Cf. Rudolph's definition: "A unitary business may apparently be defined either as an interstate business which is so integrated as to make separate accounting for the in-state business impossible, or as an interstate business in which in-state activities contribute to the out-of-state business and the out-of-state activities contribute to the in-state business." 25 *Tax Law Review* at 184.

> "The point is that such matters require a spreading of costs which can be acceptably accomplished by distributing charges on a time or a gross volume basis, or by other workable methods and they do not involve the elusive effort to segregate profits between interdependent steps and operations, such as producing in one state and selling in another. Consequently, the non-operating functions of an enterprise, although centralized, ought not lay the basis for holding the enterprise unitary."

The same considerations obviously apply to the non-operational fact of unity of ownership.

The application by the Commissioner of Revenue of formulary apportionment clearly operates in the instant case "to reach profits which are in no just sense attributable to transactions within [Minnesota's] jurisdiction." Cf. *Hans Rees' Sons v. State of North Carolina, supra.* The oppressive tax consequences resulting from the use of formulary apportionment in this case are graphically illustrated by the evidence. Petitioner's Powers Dry Goods Co. in Minnesota showed an aggregate profit of $2,365,338.00 for all of the years in question, when computed on a segregated or separate accounting basis. The aggregate profit for the same period, determined by the use of formulary apportionment, is $5,659,373.00. Tr. pp. 224, 225. Thus the methods employed by the Commissioner of Taxation more than double the income assignable to the State of Minnesota for the period under examination. The application of a formula which results in such drastic alterations of taxable net income is obviously allocating to Minnesota insome earned beyond its borders. This is contrary to the

decisions of this Court and to the 14th Amendment of the United States Constitution.

Respectfully submitted,

JOHNSON & EASTLUND
By George R. Johnson and
Ralph W. Peterson
Attorneys for Petitioner
1702 Midwest Plaza Building
Minneapolis, Minnesota 55402
Telephone. (612) 339-8931

APPENDIX "A"

STATE OF MINNESOTA
IN SUPREME COURT

No. 45217

ASSOCIATED DRY GOODS CORPORATION,
Relator,

vs.

COMMISSIONER OF TAXATION,
Respondent.

Heard before Sheran, C. J., Otis, Peterson, Kelly, and Yetka, JJ., and considered by the court en banc.

OPINION

PER CURIAM.

The court being evenly divided on the issues presented for decision in the above entitled matter, the order of the Minnesota Tax Court filed May 17, 1974, affirming an order of the commissioner of taxation dated April 17, 1970, is hereby affirmed.

Affirmed.

MR JUSTICE TODD took no part in the consideration or decision of this case.

(Endorsed. Filed October 31, 1975. John McCarthy, Clerk, Minnesota Supreme Court.)

APPENDIX "B"

STATE OF MINNESOTA
TAX COURT

ASSOCIATED DRY GOODS CORPORATION,
Appellant,

vs.

THE COMMISSIONER OF TAXATION,
Appellee.

ORDER

Entered May 17, 1974

Docket No. 1599

Taxpayer appeals from the Commissioner's Order of April 17, 1970. The Commissioner determined that taxpayer engaged in a unitary business within and without the State of Minnesota and that its income was apportionable by the 3-factor formula under Minn. Stat. 290.19 Subdivision 1(2). Appellant contends that it carried on a separate trade or business within the State of Minnesota and that it has comparaable units in other states which are local businesses in that particular community or jurisdiction.

George R. Johnson of Johnson & Eastlund, appeared for appellant,

C. H. Luther, Deputy Attorney General, for appellee.

DECISION

The Commissioner's Order is hereby affirmed.

FINDINGS OF FACT

Duane M. Peterson

1. Taxpayer-appellant, Associated Dry Goods Corporation, is a Virginia corporation with its principal office at 417 Fifth Avenue, New York, New York. It is a corporation duly qualified to do business in Minnesota.

2. Associated Dry Goods Corporation is a single corporation with a single group of corporate officers and a single board of directors.

3. Associated Dry Goods Corporation operated 15 divisions containing one or more retail department stores, each during the years 1955 through 1967.

4. Associated Dry Goods Corporation's central office staff exercises overall control of store operations through an intensive exchange of monthly operating reports and by the review and approval of seasonal forecasts of sales, profits, and capital expenditures. If a division's projected sales and profits are not acceptable to the corporation executives, the plan or forecast is rejected and sent back to the division with instructions to submit a revised forecast that is acceptable. The corporate executives maintain close contact with the management of each store.

5. The president of each division reports directly to one of appellant's corporate executives in New York. Each division president is also either a corporate or divisional vice president of the appellant corporation.

6. Powers Dry Goods division sends daily sales reports and monthly operating statements to appellant's president. Powers division also submits annual forecasts of sales, expenses and profits of Powers Dry Goods division to appellant's home office for review and approval.

7. Daily sales reports, made by each division to appellant's New York office, are compiled and disseminated on a weekly basis to all of the divisions to indicate sales trends around the country. Appellant also compiles extracts from the divisions' monthly operating statements into "comparative reports" which it circulates to the divisions to show how their operations compare with one another.

8. Appellant's various divisions operate separately and apart from one another except that corporate borrowings are based upon the combined assets and financial strength of all the divisions. Capital for the acquisition of new divisions or for the expansion of existing dvisions comes from the common corporate financial resources.

9. Appellant's financial vice president and treasurer have responsibiilty for appellant's accounting and financial matters, including making loans and loan arrangements with banks, advancing funds to the divisions and withdrawing funds from the divisions, managing divisional and corporate surplus funds, authorizing the divisions to borrow funds locally, the preparation of the corporation's Federal and State tax returns and the payment of taxes. In addition, they advise and counsel the divisions on financial and accounting matters. All of appellant's divisions use the same accounting system.

10. The decision with respect to any expansion or remodeling of any of its stores is made by appellant's board

of directors. The board also approves other expenditures of the divisions, including the amounts and the recipients of all charitable contributions.

11. Appellant's vice president, Properties and Operations Research, was responsible for helping the divisions in the design and construction of new stores. He and his staff helped the divisions' management in the selection of architects for new stores, and worked with the architects and engineers in designing new stores. They helped the divisions in letting bids to contractors for the construction of new stores and in selecting designs for the interiors of the new stores. They visited the site during the new store construction, checking to see that the construction schedule and budget were being met. They also counseled the divisions on operating matters such as receiving and delivering merchandise, cleaning and maintenance of the stores, operation of escalators, parking facilities, delivery fleets, garages, building services, etc.

12. Appellant has a Market Research Division in its New York office. In 1966 there were approximately 50 persons in the Market Research Division. That division provides essential services to the buyers from appellant's division stores during their frequent visits to the New York market. It provides them a place to headquarter, receive mail and other communications, and conduct their business when in New York on buying trips. Its personnel are marketing specialists, whose responsibility it is to know a particular line of merchandise so that when the buyers from the division stores go to New Yorkon buying trips, the marketing specialist can advise them what manufacturers to see and give them other information about their particular

line of merchandise. The marketing specialists hold meetings and merchandise shows in Associated's New York office for its store buyers, and organize committee buying activities in both the domestic and foreign markets. Additionally, through bulletins and telephone calls, buyers are kept currently informed of new developments. Through the Market Research Division and directly between the store divisions, there is a free interchange of merchandise information among the buyers from all stores. Much of the fashion stimulation in taxpayer's stores starts in its Market Research Division.

13. Appellant's stores carry many of the same line of merchandise. Appellant's contracts with manufacturers furnish merchandise using its own brand names, such as "Medalist" and "Security", which are carried by many of the divisions, including Powers.

14. The buyers in appellant's stores join together for "group buying" of common items.

15. Four top divisional executives of appellant— the president of J. W. Robinson Co.; the president of Stix, Baer & Fuller; the president of Joseph Horne Co.; and the vice chairman of Lord & Taylor—constitute a directional committee. It is their responsibility to decide whether a buying committee activity should be undertaken. A buying committee is composed of two or three of appellant's store buyers and the marketing specialist, or market representative from appellant's Market Research Division. Typically, appellant's directional committee "may decide to send a handbag committee to the Far East for straw handbags. . . . So the committee goes off to these faraway places.

They do place orders. They bring back a collection of samples. The buyers are assembled again at a time which corresponds with the normal market travel. They see the samples and place additional orders."

16. During the tax years in issue, Mr. W. Rodney Leathes was Associated's vice president, Foreign Operations. He officed in London and was also president of Associated's wholly-owned subsidiary, Associated Dry Goods (U.K.) Ltd., which conducts a market research operation very similar to Associated's Market Research Division in New York. Mr. Leathes also acted as liaison between Associated and its foreign representatives in some 19 other countries, who also performed market research services for Associated's buyers in such countries.

17. Associated holds two meetings each year of the corporate officers and the division executives. One meeting is held in September at a resort location, such as the Homestead in West Virginia or the Biltmore near Phoenix. The other meeting is held in New York City in January. The meetings usually run for two an done-half days. The purpose of the meetings is to discuss all of the problems of operating Associated's retail stores. Topics are assigned to division presidents who make a presentation on an assigned subject, which is followed by a general discussion of that subject. The meetings provide a forum for exchanging ideas and information between the stores. Frequently merchandise people are invited to attend to exchange information and ideas on merchandising.

18. Associated also holds an annual three-day Treasurre's meeting in its New York office which is attended by the treasurers of all of its store divisions for the purpose of discussing common problems.

19. Appellant frequently transfers its key personnel from one division to another and uses one divisional officer to supervise other divisions.

20. Associated has a common pension plan for all of its employees except for the Joseph Horne Division, which was acquired in 1966 and had its own pension plan tied in with other retailers in Pittsburgh. That part of the plan relating to salaries up to the Social Security base is funded with the Chemical Bank in New York. The part above the Social Security base is not funded. Johnson and Higgins are the actuaries for Associated's pension plans, including that for the Joseph Horne division.

21. While Associated will occasionally use a local insurance broker, its insurance is generally carried by Liberty Mutual Insurance Co.

22. During the tax years in issue, Associated has filed income tax returns with those states in which it operated stores. It filed its income tax returns on a separate accounting basis in Arizona, Maryland, Massachusetts, Minnesota and Missouri. It filed on an apportionment basis in Colorado, Connecticut, Kentucky, New Jersey, New York, Pennsylvania, Virginia and the District of Columbia. In California it originally filed on a separate accounting basis for the tax years 1956 through 1965, but the California taxing authorities required Associated to change to an apportionment basis for the tax years 1959 through 1965, and it has filed in California on an apportionment basis since 1965.

CONCLUSIONS OF LAW

1. During the taxable years in issue—1955 through 1967—appellant was carrying on a unitary business within and without the State of Minnesota.

2. The Order of the Commissioner of Taxation dated April 17, 1970, should be affirmed.

MEMORANDUM

1. The facts of this appeal do not present a simple case for decision. The Associated Dry Goods Corporation is a Virginia Corporation which, according to its own annual reports, operates several department stores at various locations throughout the country, with several stores in some cities. Each city's store or stores are operated as a separate division. Each division has a certain degree of autonomy. From the 1956 report the company states:

> The basic policy of Associated Dry Goods Corporation has been to operate a group of department stores, primarily catering to the medium and better-income customer to whom q lity, fashion and personal individualized service are important factors.

In the 1958 report the company stated that its then new acquisition "The Diamond" would be operated as an autonomous division of Associated as are all other Associated stores.

2. It appears that the corporation provided funds from time to time in order to add working capital to various store divisions to allow improvement of equipment and merchandise inventories. Accounting by Associated inte-

grates all operations into a single statement. The statement of Associated in no way reflects separate accounting for the various divisions. The Court has no doubt, however, that internal controls reflect separate accounting for the divisions. It is important, however, that the company reports to its own shareholders in a single unitary fasihon.

3. An example of the type of financing and decision-making of the company as found in its 1964 annual report is:

> The potential of new electronic data processing equipment to help in the record keeping and fact assembly work in our stores is being watched closely. Major electronic machine installations are in operation in two of our store divisions and other applications are in use in several others. Uses range from the huge task of preparing customers' monthly statements of account through the accounting functions of paying vendors' invoices, payroll, statistical and specialized applications to merchandising and stock-keeping records. The machines are becoming less costly to install and operate, and of greater capacity each year, so that they can be utilized to reduce record keeping costs or to provide needed facts not heretofore readily available by manual methods. We will expand such installations where feasibility studies indicate proper justification.

4. The philisophy of management of Associated gives us a good description of the company's operations from the 1968 annual report as follows:

> Each of Associated's fifteen store divisions operates as an autonomous unit with local management in com-

> plete charge of the day to day operations. This high degree of delegation of responsibility and authority has helped in the development of unusually capable executives in the stores. Management is very much aware that the talent and expertise of our executive personnel is responsible to a large degree for our profitable and sustained growth. Much attention is given, therefore, to the training and upgrading of all levels of management. The central corporate office staff is small, and exercises overall control of store operations through an extensive exchange of monthly operating reports and by the review and approval of seasonal forecasts of sales, profits and capital expenditures. Additionally, the corporate executives maintain a close contact with the management of each store and are always available to them for consultation and advice.
>
> Each store division has its own buying staff of capable and devoted merchants responsible for the selection of merchandise and the maintainance of inventory levels. The Market Research division in New York provides an essential service for these buyers. Market representatives in this office, each specializin in a particular classification of merchandise, are a constant source of information and guidance to the out of town buyers during their frequent visits to New York markets. They hold meetings and merchandise shows and organize committee buying activities in both the domestic and foreign markets. Additionally, through bulletins and tlephone calls buyers are kept currently informed of new developments.
>
> (Emphasis supplied)

5. This statement belies the statements in Associated's briefs that there is absolutely no day-to-day communications, etc. The various divisions of Associated have both similarities and dissimilarities with one another. Each division tends to run autonomously its day-to-day operations. All of the divisions operate very similar department stores. It is obvious that the business of Associated is to operate several divisions of one kind of retail department store business. The divisions are similar in that they all cater to the same type of customer. They are separate or non-unitary in that each division operates as though it were a separate company. Each division appears to be self-sufficient. None of the divisions, however, has been organized as separate corporations or separate taxpayers. They are not treated as subsidiaries in Associated's annual reports. In several states Associated does file tax returns as a unitary business. (The Court does not consider this fact to be conclusive of Associated's status in Minnesota, however, since there are so many possible difference in the statutes and regulations of other states as well as the possibility that Associated may take advantage of the laws in those states without that position being factually inconsistent with its claim in Minnesota.)

The Supreme Court has stated several times (Western Auto Supply vs. Commissioner of Taxation, 245 Minn. 346, 71 N.W. (2d) 797 as follows:

> A multi-state business is a unitary business when the operations condutced in one state benefit and are in turn benefited by the operations conducted in another state or states. The test to be applied in determining whether a business is a unitary one is based upon the following inquiry: Is the operation of the business

> within the state "dependent upon or contributory to the operation of the business outside the state?" . . .

This same test is referred to in Maurice L. Rothschild & Co. vs. Commissionr eof Taxation, Skelly Oil Co. vs. Commissioner of Taxation, The House of Vision—Belgard—Spero, Inc.,—now The House of Vision, Inc. vs. Commissioner of Taxation.

Applying the test to the facts in this case we would find that the various divisions within Associated Dry Goods are not necessarily dependent upon one another but they are certainly contributing to the success of the operations of one another.

MINNESOTA TAX COURT
/s/ Duane M. Peterson
/s/ John Knapp

Mr. Harry L. Munger did not participate in this decision.

APPENDIX "C"

Statutes and Constittutional Provisions Involved

1. United States Constitution, Amendment XIV, §1.
"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Minnesota Statutes, 1967[1]

290.02 EXCISE TAX ON CORPORATIONS; IMPOSITION, MEASUREMENT. An annual excise tax is hereby imposed * * * upon every foreign corporation, except those included within section 290.03 [engaged exclusively in interstate or foreign commerce], for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.

The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

[1]The quoted Minnesota statutes have not changed in any manner here pertinent during the years in question and may all be found in Vol. 1 of the official edition of Minnesota Statutes 1967 as follows:
§290.02, p. 2921
§290.17, p. 3011
§290.18, p. 3011
§290.19, p. 3012
§290.20, p. 3013

290.17 GROSS INCOME, ALLOCATION TO STATE. Items of gross income shall be assigned to this state or other states or countries in accordance with the following principles:

* * * * *

(3) Income derived from carrying on a trade or business, including in the case of a business owned by natural persons the income imputable to the owner for his services and the use of his property therein, shall be assigned to this state if the trade or business is conducted wholly within this state, and to other states if conducted wholly without this state. This provision shall not apply to business income subject to the provisions of clause (1);[2]

(4) When a trade or business is carried on partly within and partly without this state, the entire income derived from such trade or business, including income from intangible property employed in such business and including, in the case of a business owned by natural persons, the income imputable to the owner for his services and the use of his property therein, shall be governed, except as otherwise provided in sections 290.35 and 290.36,[3] by the provisions of section 290.19, notwithstanding any provisions of this section to the contrary. This shall not apply to business income subject to the provisions of clause (1).

(5) All other items of gross income shall be assigned to the taxpayer's domicile.

290.18 TAXABLE NET INCOME, ADJUSTED

[2]Clause (1) concerns assignability of income from personal services and personal service businesses, and is therefore not pertinent here.
[3]§290.35 and §290.36 are concerned respectively with "insurance companies' 'and "investment companies", hence, not pertinent here.

GROSS INCOME; COMPUTATION. [This section prescribes for various types of deductions from gross income and the extent to which they are deductible in arriving at taxable net income assignable to Minnesota under §290.17. There is no controversy here concerning this section but since it is referred to in the following section this brief explanation is offered.]

290.19 NET INCOME; ALLOCATION TO STATE, METHODS

Subdivision 1. COMPUTATION, BUSINESS CONDUCTED PARTLY WITHIN STATE; APPORTIONMENT. The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, whereever derived, deductions of the kind permitted by section 290.09, so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

[Here follow various arithmetical apportionment formulae. The formula applicable to a taxpayer which, like petitioner, does no manufacturing within Minnesota, consists of three factors—(1) tangible property, (2) payroll, and (3) sales, gross earnings or receipts. This section also provides that if the formulae ". . . will not properly reflect taxable net income assignable to the state, there may be used if practicable and if such use will properly and fairly reflect such income, the percentage which the sales, gross earnings, or receipts from business operations, in whole or in part, within this state bear to the total sales, gross earnings, or receipts from business operations wherever conducted; or the separate or segregated accounting method."]

Subdivision 2. APPLICATION OF METHODS. The methods prescribed by subdivision 1 shall apply wherever and in so far as the business carried on within this state is an integral part of a business carried on both within and without this state.

Subdivision 3. APPPLICATION OF SECTIONS 290.17 AND 290.18. Nothing in this section shall prevent the application of sections 290.17 and 290.18 to that portion of taxpayer's income which is not from a trade or business carried on partly within and partly without this state.

290.20 NET INCOME; ALLOCATION TO STATE, PETITION FOR OTHER METHODS. The methods prescribed by section 290. 19 shall be presumed to determine fairly and correctly the taxpayer's net income allocable to this state. Any taxpayer feeling aggrieved by the application to his case of the methods so prescribed may petition the commissioner for determination of such net income by the use of some other method, including separate accounting. Thereupon, if the commissioner finds that the application of the methods prescribed by section 290.19 will be unjust to the taxpayer, he may allow the use of the methods so petitioned for by the taxpayer, or may determine such net income by other methods if satisfied that such other methods will fairly reflect such net income. A petition within the meaning of this section shall be deemed to have been filed by the taxpayer if the taxpayer in his return uses a method other than the methods prescribed by section 290.19, and if such return shall have attached thereto a statement setting forth the reasons for the use of such other method.

APPENDIX "D"

Petitioner's Operating Divisions as of 1967

Name of Operating Division	Year Operations Commenced
Lord & Taylor New York, Manhasset, Westchester, Millburn, West Hartford, Bala-Cynwyd, Garden City, Washington-Chevy Chase, Jenkintown, Falls Church, Ridgewood-Paramus and Boston	1826
Hahne & Company Newark, Montclair and Westfield	1858
The William Hengerer Company Buffalo, Amherst and Sheridan	1836
Powers Dry Goods Co. Minneapolis, St. Paul	1881
Stewart & Co. Baltimore, New Road and Reisterstown Road	1899
The Stewart Dry Goods Company Louisville and Lexington	1846
J. W. Robinson Co. Los Angeles, Beverly Hills, Pasadena, The Valley, Anaheim, Glendale, Santa Barbara, Newport and Palm Springs	1882
The Diamond Charleston, West Virginia	1911

Sibley Lindsay & Curr Company Rochester, Eastway, Irondequoit, Newark, Southtown and Greece	1868
Erie Dry Goods Company Erie	1901
The H. & S. Pogue Company Cincinnati, Kenwood and Tri-County	1865
Goldwaters Phoenix, Scottsdale and Prescott	1870
Stix, Baer & Fuller St. Louis, Westroads, River Roads and Crestwood Plaza	1892
The Denver Dry Goods Company Denver, Cherry Creek, Lakeside, Northglenn, Greeley, Boulder and Fort Collins	1894
Joseph Horne Co. Pittsburgh, East Hills, Greengate Mall, Mt. Lebanon, Natrona Heights, Northway Mall, South Hills Village, Brentwood-Whitehall	1849

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1270

ASSOCIATED DRY GOODS CORPORATION,
Petitioner,

vs.

COMMISSIONER OF REVENUE,
Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

GEORGE R. JOHNSON
RALPH W. PETERSON
JOHNSON & EASTLUND
1702 Midwest Plaza Bldg.
Minneapolis, Minn. 55402
Tel.: (612) 339-8931
Attorneys for Petitioner

WARREN SPANNAUS
Attorney General
C. H. LUTHER
Deputy Attorney General
Centennial Office Building
St. Paul, Minnesota 55145
Tel.: (612) 296-3421
Attorneys for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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Respondent, Commissioner of Revenue of the State of Minnesota, opposes the granting of a writ of certiorari herein on the grounds that the petition does not present a substantial federal question.

ARGUMENT

As is indicated in the foregoing Statement of the Case, and confirmed in the petition herein (at page 7, lines 8 through 19), there were originally two issues in this suit:

(1) Was petitioner Associated Dry Goods Corporation carrying on a unitary business within and without the state of Minnesota?

(2) If petitioner was carrying on a unitary business within and without the state of Minnesota, is the apportionment of its net income to Minnesota by the three-factor formula violative of the equal protection or due process clause of the Fourteenth Amendment?

Petitioner has abandoned the second issue, leaving only the first, which is the issue that was dealt with and decided by the Minnesota Tax Court, and affirmed by the Minnesota Supreme Court.

The leading and model case on this issue is *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S.Ct. 701 (1942). In that case this Court held that California could properly treat the taxpayer's business as a "unitary business" where it operated wholesale distributing houses in seven states including California and maintained a central buying division. Inasmuch as there were substantially more unitary aspects to petitioner's business than were present in the *Butler Bros.* case,[1] there is no substantial federal issue presented in this case, and the *Butler Bros.* decision provides a clear statement of the applicable law.

The question whether petitioner was carrying on a unitary business within and without the state of Minnesota is essentially a question of fact to be determined by an examination of all of the relevant aspects of petitioner's business operations. The Minnesota Tax Court made such an examination, and on the basis of that examination and the applicable judicial precedents, including the *Butler Bros.* case, concluded that petitioner was carrying on a unitary business within and without the state of Minnesota. See Petition, Appendix B.

[1] See Findings of Fact, Petition, Appendix B, pp. A-3 thru A-8.

The Tax Court recognized that petitioner's "various divisions operate separately and apart from one another", that "each division tends to run autonomously in its day-to-day operations", and that "the divisions . . . are separate or non-unitary in that each division operates as though it were a separate company. Each division appears to be self-sufficient". (The same was true of the seven wholesale houses in *Butler Bros. v. McColgan*, supra.)[2] But notwithstanding these "non-unitary" aspects, the Tax Court concluded on the basis of the entire evidence that the various divisions of petitioner contribute to the success of the operations of one another, and that petitioner was carrying on a unitary business within and without the state of Minnesota.

It has long been established that this Court will not review a decision of a state court upon a question of fact that is supported by substantial evidence,[3] and the decision that peti-

[2] It is inherent in the nature of the merchandising business that each store or outlet will "operate separately and apart from one another", and will "run autonomously its day-to-day operations". Such operating separateness and autonomy is in no way inconsistent with a merchandising business being a unitary business. *Butler Bros. v. McColgan*, supra; *Maurice L. Rohtschild & Co. v. Commissioner of Taxation*, 270 Minn. 245, 133 N.W.2d 524 (1965); *Walgreen Company v. Commissioner of Taxation*, 258 Minn. 522, 104 N.W.2d 714 (1960), appeal dismissed, 365 U.S. 767, 81 S.Ct. 912; *Western Auto Supply Co. v. Commissioner of Taxation*, 245 Minn. 346, 71 N.W.2d 797 (1955).

[3] *General Motors Corp. v. Washington*, 377 U.S. 436, 441-442, 84 S.Ct. 1564, 1568 (1964); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 206 (1952); *Grayson v. Harris*, 267 U.S. 352, 357-358, 45 S.Ct. 317, 319 (1925); *Pure Oil Co. v. Minnesota*, 248 U.S. 158, 164, 39 S.Ct. 35, 38 (1918).

tioner was carrying on a unitary business within and without the state of Minnesota is essentially such a decision.

Petitioner recognizes that this is not a reviewable question, stating: "Petitioner is not asking this Court to review the evidence before the Minnesota Tax Court to determine whether or not Petitioner's enterprise is unitary or non-unitary". (Petition, p. 9.)

However, after making that clear disclaimer, petitioner immediately proceeds to ignore it and to direct the entire thrust of its argument to the contention that it was not carrying on a unitary business within and without the state of Minnesota.

We submit that a re-examination of the evidence, and a redetermination of the question whether petitioner's business was unitary, does not present a substantial federal question that warrants the attention of this Court. This is particularly true in light of the clear statement of the applicable law in *Butler Bros. v. McColgan*, supra, which governs this case.

We therefore respectfully urge that the petition for certiorari herein be denied.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
C. H. LUTHER
Deputy Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
Tel.: (612) 296-3421
Attorneys for Respondent